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In the Supreme Court of the United States

October Term, 1994

ANGEL MARTEL,
Petitioner,

vs.

COUNTY OF LOS ANGELES, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

May a litigant obtain reversal of a jury verdict for failure to continue a trial to allow further discovery without making any showing of prejudice?

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Preliminary Statement

Plaintiff Angel Martel seeks certiorari from this Court for the sole purpose of eliminating the requirement that an appellant who seeks to reverse a jury verdict for failure to grant a continuance establish that he or she has been clearly prejudiced by the lack of a continuance.

Plaintiff has not cited a single case in any circuit which stands for such a startling proposition. To the contrary, an unbroken line of precedent recognizes the logical proposition that district judges are the primary gatekeepers for determining when a trial should be postponed to allow additional discovery. They also recognize that litigants who seek to upset this discretion must establish "clear error" in two separate categories: (1) the need for a continuance, and (2) the prejudicial impact of the failure to grant one.

Plaintiff has failed to demonstrate an abuse of discretion as to either ground. Purely to justify this failure of proof and the absence of any record, plaintiff simply proposes to jettison the standard and to do away with either the requirement for a showing of need *or* a showing of prejudice.

First, plaintiff's petition is devoid of any fact-based

analysis of his manifest need for a continuance to allow additional discovery. This failure is understandable. Plaintiff never filed a timely motion for a continuance. Instead, his counsel made an ex parte application for a continuance on the very eve of trial. Plaintiff's counsel never established that he was denied the opportunity to engage in "meaningful" discovery during the three months between filing the complaint and the trial; instead, he simply filed a barebones explanation that he was too "busy" with other cases to do so.

Is certiorari necessary to allow attorneys to reverse jury verdicts based on ex parte, last minute motions for continuances?

In reality, the record shows that plaintiff's counsel never took a single deposition of any of the key witnesses in this case, even though he knew their identities little more than a month after he filed his complaint. Plaintiff's counsel

went into this trial blind, not because of any "rocket docket", but because he overbooked his own calendar, thereby preventing him from adequately representing his clients. Further, counsel never made any showing about how much additional discovery time would be necessary to permit him to engage in "meaningful" discovery. Days? Weeks? Months? Counsel cannot be heard to complain if his caseload has prevented him from pursuing discovery diligently before trial.

What meager record there is shows that plaintiff's counsel was so preoccupied with other cases that he never took advantage of *any* of the available discovery opportunities to depose numerous critical witnesses whose identities he knew. The district court acted well within its discretion in determining that additional time would not have availed him.

Second, plaintiff's petition should be denied because

of his failure to show that his case was *actually* prejudiced. There is *no* reporter's transcript. Why not? Without any sense of what transpired in this case, this Court, like the Ninth Circuit, is left completely in the dark about what additional discovery was needed and why.

The trial in this case only took three days. Despite the ease (and relatively minor expense) of preparing a reporter's transcript, plaintiff's counsel did not do so. There is *no* reporter's transcript of the proceedings at trial, nor is there any written record that plaintiff preserved his claims of error at trial.

Reasonable deadlines are constitutionally permissible and administratively necessary. District judges, by necessity, must be given wide latitude for case management. There is no abuse of discretion here.

Statement of the Case

Plaintiff filed his complaint on April 22, 1991

against the County of Los Angeles, Sheriff Sherman Block and a single sheriff's deputy Elias Cuevas arising out of an incident which occurred on June 16, 1990. (CR 1.) The County and Sheriff Block filed their answer to plaintiff's complaint on May 17, 1991. (CR 3.)

The underlying incident arose out of an emergency "911" call by plaintiff's wife, who was fearful that plaintiff was about to hurt or kill his brother during a physical altercation over control of a shotgun. Plaintiff, then under psychiatric treatment as a paranoid schizophrenic as the result of an industrial accident, had refused to take his medication and was under extreme forms of delusional thought. The defendant deputies responded to the emergency call and attempted to wrest the shotgun away from plaintiff and to control him. As a result of his unmedicated condition, plaintiff exhibited an enormous amount of strength and was impervious to pain. Plaintiff

eventually was subdued, sustaining some injuries to the struggle, and taken to the hospital. His treating psychiatrist placed him under a 72-hour hold so that he could medicate him and take him to the hospital. (CR 29 at 3:3-19:22.) Contrary to the allegations of the complaint, plaintiff was never arrested, booked or prosecuted. (*Id.* at 7:8-10.)

Plaintiff's counsel was on notice from the very outset of this case that the matter had been assigned to a district judge who endeavored to conduct discovery in an "orderly" and "cooperative" manner and to set trial dates "as early as possible." (CR 9 at 2:27-3:1.)

By May 24, 1991 – just a month after he filed his lawsuit, plaintiff' counsel was informed of the names of seven of the eight deputies who responded to the emergency "911" call. (CR 14, 15, CR 29 at 11:11-14; CR 55 at 2:25-28.) These deputies were each available for deposition in the spring and summer of 1991. (CR 55 at 3:11-13.) At that

time, plaintiff's counsel had both the right *and the opportunity* to conduct discovery, including taking the depositions of each (or all) of these deputies.

On May 31, 1991, just five days after plaintiff's counsel received the names of the deputies, the district court issued an order which set a mandatory status conference on June 24, 1991. (CR 9.) The court order also indicated that counsel should anticipate a trial date *within* two to four months of the mandatory status conference in such a non-complex case. *Ibid.*

Plaintiff's counsel personally attended the mandatory status conference on May 31, 1991. The district judge set the pretrial conference for August 26 and a *firm* trial date for next day, August 27. (CR 11, 12.) The district judge did so only after analyzing the issues in the case, exploring each side's factual and legal theories. (CR 9.)

Plaintiff's counsel knew that August 27 trial date was

"firm." (CR 2, 9; Hrng.Tr. 5:5-6.) Despite this, plaintiff's counsel did not take advantage of the *opportunity* for discovery during the summer months of 1991. None of the five deputies either named in the complaint or identified by defendants in their May 1991 discovery responses were deposed during June, July or August of 1991. Defendants essentially completed their discovery by mid-July. (CR 55 at 30:20-28.)

Plaintiff's counsel conducted no other discovery until nearly three months later, in August 1991 when he propounded interrogatory questions which went solely to issues related to the "policymaker" liability of the County and Sheriff Block under *Monell v. New York City Department of Social Services,* 437 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). (CR 30.) *Monell* was bifurcated from the main action. (CR 35, 39.)

On August 22, five days before trial, plaintiff filed an

ex-parte application to continue the pretrial conference and trial dates. (CR 28.) The application was untimely and outside the limits permitted by the local rules. Moreover, it falsely claimed that plaintiff's counsel had only "recently" learned of the identities of the defendant deputies. In reality, the record established that counsel had known of the deputies' identities since May 24, and counsel made no showing why he did not take their depositions during this three month period. Counsel claimed to be "engaged" in a variety of other matters, including a claim that he was "engaged" in a trial before U.S. District Judge Consuelo Marshall on August 23 and August 24. Although counsel had actual notice of the trial date in this case at the June 24 status conference, he did not explain why he waited until the eve of trial to file his request for a continuance, or why he proceeded on an ex parte basis.

The district court denied plaintiff's ex parte

application to continue the trial date, admonishing plaintiff's counsel for his dilatory discovery. (Hrng.Tr. 3-7.) The district court further ascertained that plaintiff's counsel's references to being "engaged" in another matters were false and misleading, including the fact that Judge Marshall's courtroom was dark while counsel claimed to be "engaged" there. (*See* Hrng.Tr. 6:20-7:12.)

The trial began on August 27, 1991. A critical witness was the psychiatrist who was treating plaintiff for his schizophrenia. This psychiatrist, who had no connection with the sheriff's department, examined plaintiff on the day of the incident and recommended that he be institutionalized. The psychiatrist also opined that plaintiff was undergoing such a psychotic state that force was necessary, in his opinion, to subdue him. (CR 29 at 6:20-22.) It was subsequently revealed that plaintiff's counsel had not even spoken or interviewed with this critical witness

until the day of trial. (CR 53 at 8:10-17.)

After three days of testimony, the jury returned with a defense verdict that no constitutional violation occurred. (See CR 42.) Given the jury's finding that the individual deputies did not violate plaintiff's constitutional rights, the district court dismissed plaintiff's contingent "*Monell*" claims. *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806 (1986). (CR 23 at 11:24-26, 12:7-14.)

Plaintiff appealed to the Ninth Circuit, but did not designate a reporter's transcript of the trial proceedings.

Plaintiff's appeal was heard by a Ninth Circuit panel consisting of Circuit Judges Stephen Reinhardt, Jerome Farris and William A. Norris. By a 2-1 vote, the panel reversed the jury verdict. *Martel v. County of Los Angeles*, 34 F.3d 731 (9th Cir. 1994). Judge Reinhardt, writing for the panel majority, held that it was "improper for the district court to hold counsel's busy schedule against his client in

this case." Panel op., 34 F.3d at 734, slip op. at 10361.

> "[W]here counsel's busy trial schedule is the primary reason for a delay in trial preparation, a continuance should generally not be denied in the absence of a prior warning, an exploration of the legitimacy of counsel's conflicting engagements and the extent to which an accommodation of counsel's schedule would prejudice the opposing party or inconvenience the court, . . ." Panel op. 34 F.3d at 735, slip op. at 10362.

The panel excused plaintiff from any obligation to provide a summary of the testimony in the case because the prejudice was "'fully apparent on the face of the record on appeal.'" Panel op., 34 F.3d at 738, slip op. at 10369. Instead, the panel took its factual discussion of the

circumstances of the case from the allegations in plaintiff's original complaint, *not* from any actual testimony. See Panel op., 34 F.3d at 732, slip op. at 10358.[1]

The Ninth Circuit granted a rehearing en banc and affirmed the judgment on the jury verdict. Eight judges concurred in the decision. Three judges, including Judge Reinhardt (the only judge on both panels) dissented. *Martel v. County of Los Angeles,* 56 F.3d 993 (9th Cir. 1995).

Plaintiff thereupon filed the instant petition for writ of certiorari.

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[1]This same complaint erroneously alleged that plaintiff had been arrested and prosecuted on the basis of false and fabricated testimony by the district attorney. In reality, plaintiff was never arrested nor prosecuted.

Argument

I. CERTIORARI SHOULD BE DENIED BECAUSE OF PLAINTIFF'S FAILURE TO ESTABLISH "CLEAR ERROR" FROM THE DENIAL OF HIS EX PARTE REQUEST FOR ADDITIONAL DISCOVERY.

The record, viewed most favorably to the district court, does not demonstrate that the district court clearly abused its discretion in denying plaintiff's ex parte motion for a continuance. This failure alone is intensely fact specific and raises no systemetic issues calling for this Court's scarce time and resources.

Plaintiff's eleventh hour application for a continuance was filed *ex-parte*, five days before trial. The application provided no legitimate explanation why plaintiff was unable to conduct discovery within the time frame set by the district court.

Waiting until the eve of trial to request a

continuance is unacceptable. *See Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964) (affirming judgment after motion for continuance made on the day of the scheduled contempt hearing of a lawyer familiar with the court's practice of not granting adjournments.) Making the requisite showing of prejudice on an ex parte basis is even less acceptable. "Ex parte applications are not intended to save the day for parties who have failed to present requests when they should have, . . ." *In Re Intermagnetics America*, 101 B.R. 191, 192-193 (C.D. Cal. 1989), emphasis added.

This Court's decision in *Morris v. Slappy*, 461 U.S. 1, 103 S.Ct. 1610, 1616, 75 L.Ed.2d 610 (1983) is closely on point. There, this Court upheld the denial of a continuance, stating:

> "Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of

> assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, *broad* discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel. [Citation.]" Emphasis added.

See also *Avery v. Alabama,* 308 U.S. 444, 446, 60 S.Ct. 321, 84 L.Ed. 377 (1940): "[D]isposition of a request for a continuance is . . . made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed."

Plaintiff's petition for writ of certiorari does not even mention the issue of his factual showing of the need for a continuance. Contrary to the rules of appellate review, his appellant's opening brief before the Court of Appeals took

his own self-serving version at face value and gave no credence to the contrary facts which supported the district court's discretionary determination to deny a continuance. "The decision to grant or deny a requested continuance lies within the broad discretion of the district court, and will not be disturbed on appeal absent *clear* abuse of discretion." *United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir.), modified, 764 F.2d 675 (9th Cir. 1985), emphasis added.

No reason to exists to grant certiorari on a case with such a weak record to sustain the need for a continuance. The record does not support plaintiff's assertion that he was denied all opportunity for "meaningful" discovery. Instead, plaintiff provided the district court with an untimely, imprecise and misleading litany of excuses why his "busy" counsel did not even take advantage of the discovery opportunities which existed.

The fact that an attorney (even a sole practitioner) is "busy" is not good cause for a continuance. *McLaughlin v.*

LaGrange, 662 F.2d 1385, 1387 (11th Cir. 1981), cert. denied, 456 U.S. 979 (1982). Vague references to being "engaged" in other trials do not meet plaintiff's burden of establishing unavailability through competent evidence. See *Weisman v. Alleco, Inc.*, 925 F.2d 77, 79 (4th Cir. 1991).

> As the First Circuit recently observed, "'[m]ost attorneys are busy most of the time and they must organize their work so as to be able to meet the time requirements of matters they are handling or suffer the consequences.'" *Mendez v. Banco Popular de Puerto Rico*, 900 F.2d 4, 7 (1st Cir. 1990).

The district judge, who was in a better position to perceive counsel's state of preparation, accurately understood that lack of preparation, not lack of opportunity, was the cause of plaintiff's failure to take the deputies' depositions. (*See* Hrng.Tr. 4:15-23.) "Appellate courts cannot too readily agree to meddle in such case-management decisions lest the trial court's authority be

undermined and the system sputter." *Mendez*, 900 F.2d at 7; *Stitt v. Williams*, 919 F.2d 516, 526 (9th Cir. 1991) (one month adequate time to conduct and review depositions.)

Here, the district court conducted a mandatory status conference at which time it analyzed various facets of this case, including the parties' factual and legal theories, as well as unusual problems that could arise at trial. (See CR 9.) It was only after the district court obtained the necessary information that the pretrial conference and trial dates were set. Plaintiff has not met his burden of showing why he was not more diligent in pursuing the discovery opportunities that he had, or that the denial was "arbitrary" or "unreasonable." *United States v. Flynt*, *supra*, 756 F.2d at 1358. In view of the "nearly impossible demands" placed on trial judges, the district judge acted within his discretion in closely monitoring his calendar to prevent needless delays. *Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 608 (7th Cir. 1986).

II. FAR FROM BEING DIVIDED, THE CIRCUITS UNIFORMLY REQUIRE A SHOWING OF PREJUDICE FROM A DENIAL OF A CONTINUANCE.

Plaintiff claims that there is a "sharp division" between the Ninth Circuit and the other circuits because of the Ninth Circuit's requirement that litigants "henceforth" must demonstrate prejudice from a failure to continue a trial to allow additional discovery. (Petition at 14.)

Plaintiff's division doesn't add up. In reality, the circuits are united in requiring a showing of prejudice. See e.g., *United States v. Scott,* 48 F.3d 1389, 1393 (5th Cir. 1995): "'This court will reverse a district court's decision denying a defendant's motion for continuance only when the district court has abused its discretion *and* the defendant can establish that he suffered serious prejudice'"; *United States v. Blandina,* 895 F.2d 293, 297 (7th Cir. 1989): "[A]ny prejudice resulting solely from the denial of the continuance motion is, at best, speculative."; *United States v.*

Davis, 967 F.2d 516, 518-519 (11th Cir. 1992): "Most important, appellant has failed to show how additional time would have aided her defense and how she was specifically prejudiced by the court's failure to grant a continuance."

> "The lack of demonstrable prejudice sounds the death knell for a 'delayed discovery' claim. See *United States v. Devin*, 918 F.2d 280, 290 (1st Cir. 1990) (explaining that a defendant who complains about tardiness in disclosure 'cannot rely on wholly conclusory assertions but must bear the burden of producing, at the very least, a prima facie showing of a plausible strategic option which the delay foreclosed.')" *United States v. Sepulveda*, 15 F.3d 1161, 1178 (1st Cir. 1993).

In *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 93 (5th Cir. 1992), a civil litigant complained, like plaintiff

here, that a trial court engaged in "trial by ambush" by forcing it to cross-examine a surprise witness whose identity had not been disclosed until ten days before trial. Although the litigant claimed a denial of its rights to cross-examine an adverse witness, the 5th Circuit found no prejudicial error:

> "The City does not explain how the admission of such evidence prejudiced its defense. Furthermore, the City does not indicate what it might have been able to establish during cross-examination if it had more time to prepare for this witness. Consequently, nothing in the City's argument suggests that a continuance would have substantially aided the City's preparation. *Lacking any proof of prejudice to the City,* we find that the district court did not abuse its discretion in admitting this evidence."

(Emphasis added.)

Other courts have had no difficulty with requiring appellants to establish with some specificity how a continuance would have made a difference. "While we do not believe that it would be fair to ask appellate counsel to describe in great detail testimony that was never given, it is fair to require that the expected testimony will be set forth in sufficient fashion to allow the reviewing court to determine the matter of prejudice." *United States v. Koen,* 982 F.2d 1101, 1115 (7th Cir. 1992).

Here, plaintiff made matters much worse by failing to provide any transcript at all. As a result of this unexplained omission, no appellate court can know how the defendant deputies testified and how their testimony affected plaintiff's case. Indeed, no appellate court can even know what plaintiff's case turned out to be. To quote from concurring judge Canby:

> "Martel, however, has given us nothing. We have no way of knowing the content of the deputies' testimony, or whether that testimony loomed large in the trial. We do not know whether Martel's own witnesses destroyed his case. [We are] basking in total ignorance of the events at trial." En banc op., 56 F.3d at 998, slip op. at 5997.

Such speculation from a silent record runs counter to the nature of discretionary decisionmaking and it contradicts the fundamental obligation of an appellant to present an adequate record for appeal.

The warnings of the Court of Appeals in *United States v. Raimondi,* 760 F.2d 460, 461-462 (2nd Cir. 1985) cogently apply:

> "When lawyers begin to perceive scheduling orders as precatory, we all suffer the

consequences. . . Cynical practitioners, aware of our desire to hear from both sides to every dispute by means of a thorough brief, may have come to expect such [relief from default for attorney neglect] to be granted as a matter of course. They would be ill-advised to assume such is the case."

Conclusion

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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